Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Section 255 of the Telecommunications Act of 1996	)	
	)	WT Docket No. 96-198
Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment By Persons with Disabilities	)	

To: The Commission

REPLY COMMENTS OF THE BUSINESS SOFTWARE ALLIANCE

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August 14, 1998

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As the Business Software Alliance ("BSA"), a trade association of the nation's leading software publishers, demonstrated in its initial Comments on the Notice of Proposed Rulemaking ("Notice" or "NPRM") in the above-captioned proceeding, the software industry has devoted substantial resources to the research and development of programs that enable persons with disabilities to use software and related products. Innovations such as voice recognition and text-to-speech technology can benefit greatly persons with disabilities, and are supported enthusiastically by the marketplace. Consequently, these innovations and others are being actively pursued by the software industry.

In an environment free from regulatory intervention, the software industry has developed astoundingly innovative products. Congress and the FCC have consistently recognized that the software industry should not be hampered by government interference in

the design and development of software.' In writing the section of the Telecommunications Act of 1996 concerning access for persons with disabilities, Section 255, Congress again decided that software should not be regulated directly. Instead, Congress limited the obligation to ensure accessibility to "telecommunications service" providers and telecommunications equipment and customer premises equipment ("CPE") manufacturers – thus excluding software providers from Section 255's requirements, to the extent they do not provide such service or manufacture such equipment. Any rules or guidelines that the Commission adopts pursuant to Section 255 should leave no doubt that software providers are not required by regulation to ensure the accessibility of software they publish. The Commission further should leave no doubt that telecommunications equipment manufacturers[2] are responsible for ensuring Section 255 compliance for any software that is integral to such equipment."

I. THE COMMISSION HAS NO AUTHORITY TO APPLY SECTION 255 TO PROVIDERS OF SOFTWARE.

Many of the commenters representing the interests of persons with disabilities expressed the view that the Commission should extend application of Section 255 beyond the

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[1] See, e.g., In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384 (rel. May 2, 1980).

[2] BSA agrees with the position asserted in the Comments by Lucent Technologies (at I. 6) that the Commission should define a "manufacturer" responsible for ensuring compliance with Section 255 obligations as the party introducing equipment into the marketplace in its final form under its brand name.

As noted in BSA's initial Comments, BSA does not disagree with the Commission's tentative conclusion that software is subject to Section 255 when it is integral to telecommunications equipment. This conclusion is consistent with the definition of "telecommunications equipment" in 47 U.S.C. §153(45). However, as indicated in the NPRM (at paras. 55-56), to the extent such software is covered by Section 255, it is the telecommunications equipment manufacturer that must ensure accessibility – not any third parties that may have provided software to the manufacturer. Congress clearly intended such a result when it specifically designated the equipment manufacturer as the party responsible for compliance in Section 255(b). Similarly, if the Commission chooses to apply Section 255 to software bundled with CPE – even though its authority to do so is questionable (*see* Comments of the Business Software Alliance at 9) – the Commission should make clear

"telecommunications services" expressly included within its reach to cover "enhanced services" or "information services" as well.[4] In support of this view, these commenters have presented policy arguments regarding the benefits for persons with disabilities of access to enhanced or information services. BSA members strongly believe that all types of new and innovative information services are beneficial for *all persons,* including persons with disabilities. For this reason, BSA members are working to ensure that their products and services are widely available and accessible, as demonstrated by the examples provided in BSA's initial Comments on the Notice. BSA does not dispute that it is very worthwhile for industry to work toward making information services and enhanced services widely accessible. However, as BSA and others have established in the record of this proceeding, Section 255 is clear in its limited grant of authority to the Commission.' The policy arguments marshaled by certain commenters cannot provide a sufficient basis for the Commission to expand the jurisdictional reach of Section 255 beyond that which Congress explicitly provided."

The Commission should reject arguments that it should implement Section 255 expansively for two reasons. *First*, the plain language of the Communications Act makes clear that Section 255 does not apply to enhanced or information services. Section 255 expressly applies to "telecommunications service" only, see 47 U.S.C. § 255(c), and

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that it is the CPE manufacturer's responsibility to ensure Section 255 compliance for such software as a component of the manufacturer's overall product.

4 See, e.g., Comments of the National Association of the Deaf at 9-15

5 See, e.g., Comments of the Consumer Electronics Manufacturers Association ("CEMA") at 9; Comments of SBC Communications at 3; Comments of Philips Consumer Communications at 8.

6 *See AT&T Co. v. FCC, 978* F.2d *727,736* (D.C. Cir. 1992), *cert. denied, MCI Telecom. Corp. v. AT&T,* 509 U.S. 913 (1993) (court invalidated the FCC's permissive detariffing scheme because the scheme

does not contain any authority for the Commission to expand its scope beyond "telecommunications service." In a companion section of the Telecommunications Act of 1996, Congress codified the Commission's long-established and carefully drawn line between telecommunications services and "information services."[7] In contrast to telecommunications services, Congress defined information services to include all non-basic, non-regulated services. See 47 U.S.C. §153(20). Because Congress excluded from Section 255 any reference to "information services," the Commission lacks authority to extend application of Section 255 beyond the scope of telecommunications services. Section 4(i) cannot support such an extension because Congress plainly decided the extent and scope of the Commission's authority in Section 255, and therefore the Commission may go no further. [8]

Second, in order to expand Section 255 to cover information services or enhanced services, the Commission would have to apply the requirements of Section 255 to providers of such services. Such a move would constitute a vast and unprecedented expansion of the Commission's regulatory authority into information services. Internet, software, and other unregulated businesses. The terms of Section 255 simply could not support such an ambitious project. Many commenters presented arguments in accord with

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exceeded the authority granted to the Commission under the Communications Act, even though the court saw merit in the Commission's policy objectives).

[7] The Commission recently reiterated this distinction in its report to Congress on funding for universal service. See Federal-State Joint Board on Universal Service, Report to Congress, CC Docket No. 96-45 (rel. April 10. 1998).

[8] *See Iowa Utilities Board v. FCC,* 120 F.3d 753 (8th Cir. 1997), cert. *granted, 1998* US LEXIS 659-668.

BSA's position strongly supporting the Commission's tentative conclusion that Section 255 does not apply to enhanced services or information services."

The additional argument of some commenters that the Commission should expand the scope of Section 255 to cover *any* software that can be viewed as performing a telecommunications function is similarly flawed.'" The language of Section 255, which clearly limits its application to providers of telecommunications services and manufacturers of telecommunications equipment and customer premises equipment, does not support an interpretation that would encompass software at-large within the provision's reach. Nothing in the language or legislative history of Section 255 supports a conclusion that Congress intended to permit the FCC to expand its authority in such a manner.

Consequently, whatever the results of this proceeding in other respects, one conclusion that must clearly emerge is that software providers, insofar as they do not provide telecommunications services or manufacture telecommunications equipment subject to regulation under the Communications Act and the 1996 Act, are outside the scope of Section 255. This conclusion is well supported not only by the legal arguments presented above, but by policy interests as well. In the absence of government regulation, developments in the highly-competitive software industry have been characterized by extraordinarily innovative responses to users' demands. Consumers in general – including persons with disabilities –

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9 *See,* e.g., Comments of SBC Communications at 3; Comments of GTE at 4-5; Comments of the Information Technology Industry Council ("ITI") at 9-l 0; Comments of the United States Telephone Association ("USTA") at 5-7; Comments of the Telecommunications Industry Association ("TIA") at 54-56.

10 See, e.g., Comments of the National Association of the Deaf at 18. These Comments and others assert that the test for determining whether software is covered by Section 255 should be one of "functionality", not whether the software is marketed separately from customer premises equipment. Nothing in Section 255 supports use of such a test, however. Rather, Section 255 calls for a simple application of the definitions of "telecommunications service" and "customer premises equipment". The only proper test is whether software falls within those definitions, and it is clear that software does not.

benefit from constantly advancing information technology, and will continue to benefit, so long as these fast-paced and unpredictable improvements are not hampered by government regulation. Efforts to use Section 255 to justify regulatory intrusion into the dynamic realm of software must be rejected as both unnecessary and unwise.

II. COMMENTERS AGREE THAT THE COMMISSION SHOULD ADOPT PROCEDURES THAT ARE FAIR AND PRACTICAL.

Many of the comments submitted in this proceeding concur on several basic conclusions as to how the procedural issues raised in the NPRM should be resolved. BSA agrees with many of these points, which are aimed at promoting fairness and efficiency in handling complaints under Section 255. In particular, we support the following:

- ✓ Companies receiving complaints should have at least a 30-day response period (such as the Commission permits for informal complaints). [11]
- ✓ Complainants should be required to establish standing to lodge a complaint under Section 255. [12]
- ✓ A time limit for filing a Section 255 complaint is essential."
- ✓ Damages cannot be assessed against non-carriers. [14]
- ✓ Access to proprietary information must be severely restricted in complaint proceedings. [15]

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[11] See, e.g., Comments of the Personal Communications Industry Association ("PCIA") at 13-14; Comments of the Multimedia Telecommunications Association at 24-25.

[12] See, e.g., Comments of Philips Consumer Communications at 12- 14; Comments of CEMA at 17-19.

[13] See, e.g., Comments of TIA at 86-87; Comments of CEMA at 19-20.

[14] See, e.g., Comments of ITI at 43; Comments of TIA at 97-98.

[15] See, e.g., Comments of GTE at 14-15; Comments of TIA at 89-91.

- ✓ Consumers should be required, rather than merely encouraged, to contact the relevant manufacturer or service provider before submitting a Section 255 complaint to the Commission.'"

These points are essential to the creation of a practical and even-handed set of procedures for implementing Section 255.

Another key point on which several commenters firmly agree is that the Commission's "readily achievable" analysis must recognize that only the financial resources actually available to the particular manufacturing business unit responsible for a certain product or product line should be considered in determining Section 255 compliance.[17] An analysis that instead considers all of the resources of a corporate parent would be out of touch with the realities of how modern, highly competitive corporations operate and are organized.

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[16] See, e.g., Comments of PCIA at 12; Comments of ITI at 36-38.

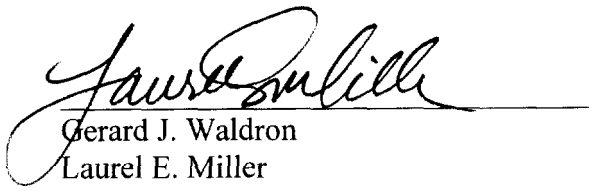
[17] See, e.g., Comments of GTE at 9-10; Comments by Lucent Technologies at 1: Comments of CEMA at 12-13; Comments of USTA at 11; Comments of ITI at 27-28.

CONCLUSION

For the foregoing reasons, as well as those stated in BSA's initial Comments on the NPRM, we urge the Commission to apply Section 255 to telecommunications services and equipment only, in accordance with Congress's intention.

Respectfully submitted,

BUSINESS SOFTWARE ALLIANCE



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